

# CLIENT UPDATE

## CFTC GRANTS TEMPORARY NO-ACTION RELIEF FOR PERSONS ELIGIBLE FOR THE TRADE OPTION EXEMPTION FROM CERTAIN REQUIREMENTS OF SECTION 32.3 OF THE CFTC REGULATIONS

### NEW YORK

Byungkwon Lim  
blim@debevoise.com

Aaron J. Levy  
ajlevy@debevoise.com

On August 15, 2012, the Commodity Futures Trading Commission (the “CFTC”) issued a no-action letter providing that market participants may, for a limited time, rely on the trade option exemption under section 32.3 of the CFTC regulations without complying with specified provisions thereof. The temporary no-action relief is available to market participants that are in compliance with (1) the conditions for qualifying as a “trade option” set forth in section 32.3(a) of the CFTC regulations;<sup>1</sup> (2) the position limits rules set forth in Part 151 of the CFTC regulations;<sup>2</sup> (3) the prohibitions against fraud, manipulation, and other abusive practices set forth in Part 180 and section 23.410 of the CFTC regulations and (4) the antifraud, anti-manipulation and enforcement provisions of sections 2, 4b, 4c, 4o, 4s(h)(1)(A), 4s(h)(4)(A), 6, 6c, 6d, 9 and 13 of the Commodities Exchange Act (the “CEA”).

---

<sup>1</sup> The conditions for qualifying as a “trade option” under section 32.3(a) of the regulations of the CFTC are described in our previous client update entitled “CFTC Final Rules on Commodity Options,” published on April 20, 2012, and available at the following link: <http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=4abcb79f-f47a-42d6-a8fa-aa50c31da17f>

<sup>2</sup> In a footnote to the no-action letter, the CFTC notes that, given its separate, ongoing efforts to modify the position limit regime (see e.g., Aggregation, Position Limits for Futures and Swaps, 77 F.R. 31767 (May 30, 2012)), it is not appropriate to include position limits in the scope of this no-action relief.

The no-action letter states that, during the pendency of this no-action relief, where a market participant is in compliance with the above obligations (in each case, subject to any additional no-action relief provided by the CFTC with respect to such obligations),<sup>3</sup> the Division of Market Oversight will not recommend that the CFTC commence an enforcement action against such market participant for failure to comply with any other provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), the CEA or the regulations of the CFTC applicable to commodity options that are swaps.<sup>4</sup>

On April 27, 2012, the CFTC published final commodity option rules and interim final rules incorporating a trade option exemption from most provisions of Dodd-Frank, the CEA and the regulations of the CFTC. In the release accompanying those rules, the CFTC noted that, while commodity options are “statutorily defined as swaps” and therefore “subject to the same rules applicable to any other swap,” such options may be exempt from the general Dodd-Frank regime if the offeror, the offeree and the transaction meet the requirements of the trade option exemption. The CFTC added that the final product definitions rules would address the determination of whether a commodity option or a transaction with optionality is subject to the swap definition in the first place.

On August 13, as part of a joint rulemaking with the Securities and Exchange Commission, the CFTC published final rules and interpretations further defining the term “swap.” In the accompanying release, the CFTC indicated that transactions with embedded volumetric optionality may satisfy the forward exclusion from the swap definition under certain circumstances. The CFTC issued a request for public comment on its interpretation regarding forwards with embedded volumetric options. In this request for comment, the CFTC noted its intention to issue no-action relief with respect to certain conditions of the modified trade option exemption, which relief would last until December 31, 2012, affording the CFTC an opportunity to evaluate comments received, and determine whether changes are appropriate, with respect to its interpretation regarding both embedded volumetric optionality and the modified trade option exemption.

This no-action relief will remain in effect through the earlier of (1) December 31, 2012 or (2) the effective date of any final rule, interpretation or order adopted or issued, as applicable, by the CFTC as a result of comments received in response to the interim final

---

<sup>3</sup> The CFTC clarifies in a footnote to the no-action letter that the relief set forth in such letter is not exclusive, and that any additional no-action or other relief the CFTC may provide during the pendency of this no-action relief would supersede or supplement this relief.

<sup>4</sup> The CFTC clarifies in a footnote to the no-action letter that this relief does not apply to commodity options that are excluded from the definition of the term “swap,” since no such relief is necessary.

rules incorporating the trade option exemption set forth in section 32.3 of the CFTC regulations.

\* \* \*

August 16, 2012